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FILED
NOV 24 2004
CLERK

No. 03-388

IN THE

Supreme Court of the United States

DENNIS BATES, ET AL.,

Petitioners,

v.

DOW AGROSCIENCES, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF CROPLIFE AMERICA AND NATIONAL PEST MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DOUGLAS T. NELSON
SEEMA MAHINI
CROPLIFE AMERICA
1156 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 296-1585

* Counsel of Record

LAWRENCE S. EBNER *
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae **CropLife America** and **National Pest Management Association** have a substantial interest in the subject of this appeal—the preemptive reach of § 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The members of these nationally prominent trade associations are the types of companies (pesticide manufacturers, formulators, and distributors, and structural pest control firms) that most frequently are subjected to agricultural crop damage, homeowner property damage, and personal injury suits involving the use of pesticides. The associations are submitting this *amicus curiae* brief for three principal reasons:

(i) To rebut Petitioners' insinuations that affirming the Fifth Circuit's opinion below somehow would shield agricultural pesticide manufacturers from all state law damages remedies for pesticide-related crop injury, and leave aggrieved farmers with no means of obtaining compensation;

(ii) To explain why federal preemption of failure-to-warn and other *labeling*-related damages claims promotes FIFRA's goals and is essential for maintaining the important health, safety, environmental, and product performance benefits provided by nationally uniform pesticide product labeling that is regulated solely by the United States Environmental Protection Agency (EPA); and

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[1] The parties have lodged with the Clerk blanket consents to the filing of *amicus curiae* briefs. Pursuant to Sup. Ct. R. 37.6, *amici curiae* CropLife America and National Pest Management Association state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

(iii) To highlight the implausibility of Petitioners' contention that by enacting FIFRA's so-called efficacy data waiver, Congress intended to create a gaping exception to preemption for labeling-related damages claims that involve agricultural crop injury.

CropLife America, a national, not-for-profit trade association, represents the American plant science industry on a broad range of legislative, regulatory, legal, scientific, and product stewardship issues. Its members serve farmers and consumers by developing, manufacturing, and distributing virtually all of the agricultural crop protection pesticides and biotechnology products used to produce safe, high-quality, affordable, and abundant food, fiber, and other crops.

For the past 57 years, CropLife America (formerly known as the American Crop Protection Association, and before that, the National Agricultural Chemicals Association) has been industry's foremost voice on enactment, amendment, and implementation of FIFRA, the nation's primary pesticide regulatory statute. CropLife America and its members consider FIFRA's carefully balanced allocation of pesticide regulatory authority between EPA and the states, especially the system of federally regulated, nationally uniform product labeling mandated by § 136v(b), to be a subject of paramount importance. For this reason, CropLife America has an abiding interest in ensuring that courts, when confronted with state law liability claims that directly or indirectly attack the adequacy of the warnings, precautionary measures, directions for use, or other information on a pesticide's federally regulated product labeling, properly apply § 136v(b), which expressly preempts the states from imposing "any requirements for labeling" that are "in addition to or different from" those imposed under FIFRA. 7 U.S.C. § 136v(b).

On numerous occasions during the past 12 years, CropLife America has successfully argued in *amicus curiae* briefs submitted to federal courts of appeals and state appellate

courts that § 136v(b) encompasses requirements imposed through state damages claims for inadequate labeling or failure to warn. In addition, last year CropLife America filed an *amicus curiae* brief urging review of the Texas Supreme Court's opinion in *American Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 539 U.S. 969 (2003), which contrary to the Fifth Circuit's opinion here, erroneously held that all agricultural crop damage claims (including those that are labeling-related) are excluded from preemption.

The **National Pest Management Association** ("NPMA") is a national, not-for-profit, trade association representing more than 5,000 pest control companies throughout the United States. The association's members help protect food, health, property and the environment with a broad range of pest management services such as control of termites, insects, and rodents in residential, commercial, and institutional settings; control of mosquitoes and wildlife that transmit West Nile Virus or other life-threatening diseases; and control of stored product pests in food handling and agricultural surroundings. NPMA, which was established in 1933, supports its members through technical, educational, business, public relations, and government affairs programs. Since pest management professionals are both required and trained to apply pesticides in a manner consistent with their nationally uniform, EPA-approved product labeling, NPMA participates as *amicus curiae* in appeals involving important issues arising under FIFRA, including the statute's preemptive effect. For example, NPMA and other associations (including CropLife America) jointly filed an *amicus curiae* brief in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (involving FIFRA preemption of a local government pesticide use ordinance), in which the Court confirmed (*id.* at 615) that "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." NPMA has

joined CropLife America here because the categorical anti-preemption position that Petitioners and most of their *amici* are advocating would severely undermine the congressionally mandated system of nationally uniform pesticide product labeling, which greatly facilitates applicator training and safety, and helps to protect consumers and the public.

SUMMARY OF ARGUMENT

The scope of FIFRA's express preemption provision, § 136v(b), is defined by its own plain, broad, language. States are unequivocally prohibited from imposing "any requirements for *labeling*" which are "in addition to or different from" those required under FIFRA. 7 U.S.C. § 136v(b) ("Uniformity") (emphasis added). This Court's preemption jurisprudence establishes that a federal statutory prohibition against imposition of state requirements easily encompasses requirements imposed through state damages actions. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992); *see also Medtronic v. Lohr*, 518 U.S. 470, 504, 509 (1996); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Therefore, as numerous federal courts of appeals and state appellate courts have held, § 136v(b) expressly preempts any state damages claim, such as a claim based on failure to warn, that would have the effect of imposing state requirements for labeling which are in addition to or different from those that have been imposed under FIFRA. The same courts have been equally clear, however, that § 136v(b) does not preempt non-labeling related claims. Petitioners' overblown assertions implying that § 136v(b) immunizes pesticide manufacturers from all "damages actions" (rather than merely preempting labeling-related claims), and leaves farmers with no means of obtaining compensation for crop injury, are unfounded both as a matter of law and fact. Pesticide manufacturers are excellent product stewards, and have strong economic incentives for resolving crop injury problems before they turn into litigation. This is why crop damage litigation is the exception, not the norm.

Nationally uniform product labeling that is regulated solely by EPA plays a critical role in achieving FIFRA's fundamental goal of protecting health and the environment. For example, such labeling is an essential component of educational and training programs for pesticide applicators, and enormously aids applicator comprehension of, and compliance with, label warnings, precautionary measures, and directions for use. Only EPA (and certainly not a lay juror) has the expertise, experience, and other resources to determine, on a product-by-product, category-by-category, or across-the-board basis, what specific warnings, precautionary measures, and other information should or should not be included on nationally uniform pesticide labeling. Rather than having a salutary effect, the nationwide epidemic of labeling-related damages suits that Petitioners and their *amici* are urging this Court to trigger would clash with FIFRA's health and environmental goals by drastically undermining the integrity of EPA's labeling determinations, and for all practical purposes, destroying national labeling uniformity.

Section 136v(b), enacted in 1972, contains no exception to preemption for labeling-related damages claims that involve agricultural crop injury. Nor did Congress intend to amend § 136v(b), or otherwise affect that provision's self-executing operation, when in 1978 at EPA's request, it streamlined FIFRA's federal registration procedures, including by enacting the efficacy data waiver authorization found in § 136a(c)(5). Congress authorized EPA to selectively waive submission of efficacy data to support a registration because of the high level of efficacy-related expertise within the agricultural community, *not* the courtroom. Lay juries would not have the type of expertise that Congress had in mind if called upon in a crop injury suit to second-guess the adequacy of EPA's labeling determinations.

ARGUMENT

I. SECTION 136v(b) OF FIFRA NEITHER PREEMPTS ALL DAMAGES CLAIMS AGAINST PESTICIDE MANUFACTURERS NOR PRECLUDES FARMERS FROM OBTAINING COMPENSATION FOR CROP INJURY

A. The Lower Courts Have Consistently Held That Only *Labeling*-Related Damages Claims Are Preempted By § 136v(b)

By its own express terms, § 136v(b) of FIFRA is limited to preemption of "any requirements for *labeling* . . . in addition to or different from those required under [the Act]." 7 U.S.C. § 136v(b) (emphasis added). As a result, only *labeling*-related damages claims, such as failure-to-warn claims (which necessarily impose state law requirements for "adequate" label warnings), are expressly preempted. This is the fixed, statutorily defined scope of tort preemption under § 136v(b). Nevertheless, in an effort to bolster their extreme position that § 136v(b) does not preempt *any* damages claims, Petitioners, in the first 29 pages of their brief, attempt to transform FIFRA preemption into an all-or-nothing proposition. They erect and then take aim at an easy but illusory target, namely that Congress did not intend § 136v(b) to immunize pesticide manufacturers from all state law liability or deprive farmers of all state law damages remedies. *See, e.g.*, Pet. Br. at 2 ("it is unthinkable that Congress . . . intended to exonerate manufacturers from traditional state-law remedies"); at 14 ("State damages actions are not preempted by FIFRA"); at 16 ("Nothing . . . indicates that Congress intended to . . . preclud[e] farmers from seeking redress for the damages caused to them by pesticide manufacturers."); at 25 ("FIFRA's Legislative History And Purposes Reveal No Intent To Preempt Damages Actions"); at 26 ("no witness or Member of Congress ever suggested that the proposed [1972] legislation would shield pesticide manufacturers from product

liability tort suits"); at 29 ("it does not follow that *all* such claims are barred").

Unlike virtually every lower court that has opined on the scope of FIFRA tort preemption, Petitioners and their *amici* somehow overlook the clearly circumscribed preemptive boundary of § 136v(b) (*i.e.*, preemption of additional or different requirements for *labeling*) and that provision's resultant limitation to *labeling*-related damages claims, such as claims for failure to warn.[2] To be sure, "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are numerous, consistent, pragmatic and powerfully reasoned." *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366, 368 (Cal. 2000).[3] But as the Fifth Circuit reconfirmed in its opinion below, "FIFRA does not preempt common law that is unconcerned with [pesticide] labeling." Pet. App. 10a (citing *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 398 (5th Cir. 1999)); *see also id.* at 11a (quoting *Hart v. Bayer Corp.*, 199 F.3d 239, 245 (5th Cir. 2000) ("FIFRA preemption does not extend to non-labeling state common-law causes of action"). Indeed, "courts have rejected preemption challenges with regard to a wide variety of claims where they did

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[2] Section 136v(b) also preempts "any requirements for . . . packaging in addition to or different from those required under [FIFRA]." Nothing in this brief is intended to imply that § 136v(b) does not also encompass packaging-related claims.

[3] The California Supreme Court squarely rejected all of the arguments, many of which are repeated by Petitioners here, in what Petitioners nevertheless describe as the "powerful brief" (Pet. Br. at 28) filed by the government as *amicus curiae* in *Etcheverry*. *See Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002) ("The California Supreme Court found the EPA's position [in *Etcheverry*] both unsupported by the relevant law and unpersuasive in its substance, noting that the EPA's views went against the holdings of eight federal circuit courts of appeal."). Last term the government advised this Court that it has "reexamined the position that it urged in *Etcheverry* [and] concluded that [it] is incorrect." U.S. Br. at 17, *American Cyanamid Co. v. Geye* (No. 02-367).

not implicate requirements for labeling." *Etcheverry*, 993 P.2d at 377 (collecting cases).

For example, in *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002), the court of appeals reaffirmed that " 'if the state law claim is *premised* on inadequate labeling or a failure to warn,' which results in the imposition of additional or different labeling requirements, the claim is nonetheless preempted regardless of the guise under which the claim is presented" (quoting *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999)); *see, e.g., Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 565 (1st Cir. 1996) (§ 136v(b) preempts a purported design or manufacturing defect claim if it actually is a "disguised labeling claim"). But "[t]he line between a claim for mislabeling and a claim for a defective product may not always be clear." *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993). The court of appeals agreed with the plaintiff in *Netland* "that defectively manufactured or designed products properly labeled under FIFRA remain subject to state regulation, in the form of common law or other claims." 284 F.3d at 900. Thus, § 136v(b) would not preempt a farmer's claim that his crops were destroyed by a herbicide which, due to a manufacturing error, contained substantially more active ingredient than allowed by its FIFRA registration. Nor would § 136v(b) preempt a claim that a herbicide was ineffective in killing weeds because it contained substantially less active ingredient than approved by EPA. Along the same lines, a claim that "particular lots" of herbicide caused crop damage because they were "negligently contaminated" with another herbicide has been held not preempted. *In re DuPont-Benlate Litigation*, 859 F.Supp 619, 622, 623 (D.P.R. 1994); *see also Nat'l Bank of Comm.*, 165 F.3d at 608-09 (§ 136v(b) does not preempt a claim based on the presence of a "toxic impurity" in a pesticide product). And a district court recently ruled

that § 136v(b) does not preempt a negligent distribution claim alleging that a bulk container of an agricultural pesticide "erupted" and caused environmental contamination. *See Akee v. Dow Chem. Co.*, 272 F.Supp.2d 1112, 1127 (D. Hawaii 2003) ("the court does not see anything in the record before it suggesting that this claim is in any way a labeling or warning based claim").

The lower courts have been virtually unanimous in holding that "[w]hen a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry*, 993 P.2d at 376 (collecting cases). For example, § 136v(b) preempts claims alleging that a pesticide is "misbranded" (which § 2(q)(1)(G) defines to include labels that do not contain adequate warnings). *See, e.g., Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997); *Papas v. Upjohn Co.*, 985 F.2d 516, 518-19 (11th Cir. 1993). But a claim alleging that the manufacturer of corn seed which was genetically modified to be resistant to certain insects failed to comply with the terms of a FIFRA conditional registration, such as selling the seeds without the label required by EPA, has been held not to impose an additional or different requirement for labeling, and thus, not preempted. *See In re Starlink Corn Products Liability Litigation*, 212 F.Supp.2d 828, 836 (N.D. Ill. 2002).

Further, the lower courts have consistently held that § 136v(b) preempts claims for misrepresentation or breach of express warranty based on so-called "off-label" statements (*e.g.*, advertising statements; oral statements) "if they merely repeat information in the label itself." *Kuiper*, 131 F.3d at 662; *see also* Pet. App. 17a (farmers' fraud and breach of warranty claims are preempted "[b]ecause no evidence was presented demonstrating that the retailer statements deviated from the contents of the Scepter label"); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995) (FIFRA

preempts claim based on distributor's oral representation regarding crop safety where there was "no evidence establishing that [it] made any statements that were inconsistent with or went beyond the labels"); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 127-30 (4th Cir. 1995) (§ 136v(b) preempts claims based on "off-label" representations which do not "substantially differ" from the label). As the California Supreme Court indicated in *Etcheverry*, however, "[w]here off-label statements address matters outside the scope of the label, an action may well lie." 993 P.2d at 378; *see, e.g., In re Starlink*, 212 F.Supp.2d at 836-37 ("Claims based on off-label representations . . . are not preempted . . . to the extent the representations substantially differ from the label."); *id.* at 837 (holding that oral statements to farmers that genetically modified corn "was safe for human consumption . . . directly contradict the approved label"). Thus, if a herbicide were registered only for use on peanuts, but the manufacturer advertised that it also works well on cotton, § 136v(b) would not preempt a cotton crop injury claim based on that off-label statement, since it substantially differs from, rather than repeats the information on, the EPA-approved label.

Therefore, affirming the principle adopted by numerous federal and state appellate courts that § 136v(b) preempts only failure-to-warn and other labeling-related claims would *not*, as Petitioners claim, give "sweeping effect to the preemption provision." Pet. Br. at 1. Preemption of such claims benefits farmers and the public by preserving the national labeling uniformity mandated by Congress (see discussion *infra*), but contrary to the hyperbolic advocacy of Petitioners and their *amici*, in no way precludes farmers or other plaintiffs from pursuing non-labeling related damages actions against pesticide manufacturers. *See Lescs v. William R. Hughes, Inc.*, 168 F.3d 482 (Table), No. 97-2278, 1999 WL 12913, at *7 (4th Cir. Jan. 14, 1999) (Text) ("FIFRA's language does not suggest some extraordinarily broad scope

of preemption that extends beyond the statutory scheme. Nor does it work to destroy all means of redress for plaintiffs under the common law of a state.").

B. Agricultural Pesticide Manufacturers Are Conscientious Product Stewards Which Strive To Maintain Good Will With Farmers Through Prompt Resolution Of Crop Injury Claims

According to Petitioners, "[b]ecause nothing in FIFRA affords compensation to parties injured by pesticides, state-law damages claims properly fill the void left by Congress." Pet. Br. at 14. This facile logic erroneously implies that litigation is the only way that farmers can obtain compensation from pesticide manufacturers for crop injury. Like most farmers, these Petitioners, to whom Respondent offered the opportunity to obtain reasonable compensation without litigation (*see* J.A. 143-45), know better.

In reality, pesticide manufacturers are an integral, well respected part of the agricultural community. Along with university researchers, agricultural extension agents, private crop consultants, seed suppliers, farm store retailers, and custom applicators, pesticide manufacturers and their distributors serve as an important informational resource to farmers. For example, manufacturers provide farmers, either directly or through distributors and retailers, with abundant technical information regarding their products and how they can be used safely and effectively on particular crops. In addition, manufacturers continually interact with farmers to better learn how their products perform in specific geographic locations or under particular environmental conditions. Such information can lead to more finely tuned directions for use, and when necessary, use restrictions.

Moreover, R&D-oriented pesticide innovators invest hundreds of millions of dollars in screening, testing, and registering highly efficacious new products that benefit farmers, the

agricultural economy, and consumers throughout the United States and world. These include, for example, low dose, less toxic products which break down rapidly after application to food crops; products applied with advanced delivery systems that reduce applicator and environmental exposure; and biotechnology products, such as genetically engineered seed that grows into insect-resistant crops. Prior to obtaining a FIFRA registration for a new agricultural pesticide, a manufacturer may conduct more than 250 health, safety, environmental, and efficacy studies. In addition to their individual activities, pesticide manufacturers, through CropLife America, participate in industry-wide product stewardship programs, such as the Ag Container Recycling Council, which helps farmers reduce disposal costs and avoid environmental contamination.

Petitioners' contention that a multitude of lay jurors, who know nothing about crop production or pesticides, should have free reign to find that pesticide manufacturers' EPA-approved labeling is inadequate, and on that basis, render huge damages awards in order to fill a FIFRA compensation "void," fails to take into account the highly collegial and cooperative relationship between agricultural pesticide manufacturers and farmers. As a matter of good product stewardship and sound business sense, manufacturers' regional and local field representatives, who typically have considerable agronomic expertise, work closely with farmers to promptly investigate and resolve product performance and/or crop injury problems without litigation. Most pesticide manufacturers have well established customer satisfaction policies. When circumstances warrant, and depending on the nature of the problem, remedies provided by manufacturers may range from re-application of pesticides at the manufacturer's expense, to reimbursement of the cost of unsatisfactorily performing products, to replacement of seed or monetary compensation for injured crops. Upon the infrequent event of widespread crop injury problems with a product, manu-

facturers have established formal claims settlement procedures (such as the Strongarm mediation program initiated by Respondent here) in order to maintain the company's reputation and good will, treat farmers fairly, and avoid lawsuits.

If FIFRA tort preemption were the all-encompassing product liability defense that Petitioners and their *amici* pretend to fear, manufacturers, aside from their excellent product stewardship and strong economic incentives for satisfying farmers' needs, would have little reason to resolve crop injury claims. Instead, manufacturers invest substantial financial resources to resolve any crop injury problems that farmers encounter. As a result, and contrary to the impression that Petitioners try to create, the need to file crop damage suits for the purpose of obtaining compensation from pesticide manufacturers is the exception, and certainly not, as Petitioners assert, a reason to hold that § 136v(b) is limited to positive enactments.

II. FIFRA PREEMPTION OF LABELING-RELATED DAMAGES CLAIMS PRESERVES THE SIGNIFICANT HEALTH, SAFETY, ENVIRONMENTAL, AND PRODUCT PERFORMANCE BENEFITS OF EPA-REGULATED, NATIONALLY UNIFORM PRODUCT LABELING

A. Nationally Uniform Product Labeling Plays A Crucial Role In The Coordinated Federal/State Regulatory Partnership Established By Congress

"FIFRA's historic focus [is] on labeling." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. at 613. When FIFRA was first enacted in 1947, it was intended to supplement existing regulation of pesticides by the states. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 n.2 (1984); *National Agric. Chem. Ass'n v. Rominger*, 500 F. Supp. 465, 468 (E.D. Cal.

1980). But even back then, Congress was concerned about the need for promoting national uniformity in pesticide labeling. *See* H.R. Rep. No. 313, at 3 (1947) (noting that the 1947 FIFRA "is in accord" with the Uniform State Insecticide, Fungicide, and Rodenticide Act; that enactment of the federal legislation "will greatly facilitate the coordination of work in this field among the States and with the Federal Government;" and that "[i]t is highly desirable that laws governing [pesticides] be as nearly uniform as possible . . . so that manufacturers may have Nation-wide distribution with a *minimum of conflict between the labeling requirements* of the various laws.") (emphasis added). To this end, "[t]he 1947 legislation . . . contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including directions for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product." *Ruckelshaus*, 467 U.S. at 991. There was, however, no express preemption provision regarding state regulation of labeling.

"In 1972, growing environmental and safety concerns led Congress to undertake a comprehensive revision of FIFRA." *Mortier*, 501 U.S. at 601. Congress transformed the Act into a "comprehensive regulatory statute" (*Ruckelshaus*, 467 U.S. at 991) and "significantly strengthened [its] registration and labeling standards." *Mortier*, 501 U.S. at 601. During its extensive deliberations, Congress carefully considered the allocation of pesticide regulatory authority between the newly created EPA and the states in order to establish "a coordinated Federal-State administrative system to carry out the new program." *Id.* at 615 (quoting H.R. Rep. No. 92-511, at 1). Under that "regulatory partnership" the states share responsibility with EPA for regulating the sale and use of pesticides, but pesticide "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Id.*; *see also New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 118 (2d

Cir. 1989) ("The states have joint control with the federal government in regulating the use of pesticides . . . with the exception of the EPA's exclusive supervision of labeling.").

More specifically, the 1972 FIFRA amendments added § 136v(b) ("Uniformity"), which Congress intended "to completely preempt State authority in regard to labeling." H.R. Rep. No. 92-511, at 16 (1971). Representatives of both the pesticide industry and agriculture testified in support of the need for national labeling uniformity. *See, e.g. Fed. Env. Pesticide Control Act: Hearings Before the Subcomm. on Agric. Research & Gen'l Legis. of the Sen. Comm. on Agric. & Forestry*, 92d Cong. 416 (Mar. 9, 1971) (Stmnt. of Parke C. Brinkley, President, Nat'l Agric. Chem. Ass'n) (EPA has "sufficient scientific expertise [for] the determination of the proper labeling . . . of each product. There is no need for this process to be duplicated in each of the 50 States."); *id.* at 354 (Stmnt. of Clifford G. McIntyre, Director, Natural Resources Dept., and Ass't Legis. Dir., Am. Farm Bureau Fed.) ("In labeling the manufacturers have a real problem with the whole diversified requirements in 48 States. We accept the concept of some uniformity."). EPA and state pesticide regulators also supported national uniformity. *See id.*, 92d Cong. 87 (Mar. 7-8, 1972) (Stmnt. of David D. Dominick, Ass't Admin. for Categorical Programs, EPA) ("I think that the basic thrust that is needed in new legislation is uniformity [of] registration."); *id.* at 153 (Stmnt. of Charles H. Frommer, Dir., Bureau of Pesticide Control, N.Y. State Dep't of Env'l Conservation) ("We very strongly favor the provision of [§ 136(b)] which provides for uniform labeling. We have endorsed uniform labeling and we intend to continue to endorse uniform labeling.").

As the Solicitor General explained to the Court in *Mortier*, "an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling." U.S. Br. at 22, *Wisconsin Pub. Intervenor v. Mortier* (No. 89-1905).

Thus, as amended, "FIFRA placed the 'labeling' of pesticides within the singular province of the EPA." *Jorling*, 874 F.2d at 117. Indeed, Congress intended a pesticide's nationally uniform, EPA-approved product labeling not to be merely a "guide," but instead, "the final authority" governing application of a pesticide. S. Rep. No. 95-334, at 4 (1977). Further, prior to 1972, FIFRA contained "no prohibition . . . against the misuse of a registered pesticide." S. Rep. No. 92-838, at 4 (1972). In order to correct this deficiency, Congress added § 136j(a)(2)(G), which makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). To underscore the importance of this federal statutory prohibition, EPA requires every pesticide label to caution applicators that "It is a violation of Federal law to use this product in a manner inconsistent with its labeling." 40 C.F.R. § 156.10(i)(2)(ii). In fact, FIFRA's fundamental precept that "The Label Is The Law" is a prominent feature of the basic training provided in virtually every state-sponsored pesticide applicator training program. *See, e.g.*, Northeastern Regional Pesticide Coordinators, *Pesticide Applicator Training Manual* (commonly referred to as the multi-state "*Core Manual*"), Ch. XIV-3 (2d ed., revised 1998).

Pesticide labeling is different from the ordinary labels placed on most types of products. It is the principal means by which EPA ensures that all necessary warnings, safety precautions, personal protective equipment requirements, directions for use, and other essential information is communicated from a pesticide's manufacturer through the chain of distribution to the individuals who actually handle and use the product. *See* 40 C.F.R. Part 156 (Labeling Requirements for Pesticides); *see also Jorling*, 874 F.2d at 119 ("'FIFRA labeling' is designed to be read and followed by the end user."). EPA continually stresses the importance of reading and complying with all pesticide labeling requirements. *See,*

e.g., "Read the Label First" (http://www. epa.gov/pesticides/label). It is difficult to overstate the substantial health, safety, environmental, and product performance benefits that nationally uniform, EPA-regulated product labeling affords to farmers, professional pesticide applicators, and the public:

First, EPA has the necessary personnel, expertise, experience, institutional policies, funding, and national perspective, and possesses (or has access to) the registration data (*e.g.*, product chemistry data; toxicity data; environmental fate data; fish and wildlife data; *and* efficacy data) required to comprehensively regulate the warnings, precautionary measures, directions for use, and other information on a product's labeling before and/or after the product is registered. Needless to say, review and regulation of product labeling is a responsibility which EPA takes very seriously. *See, e.g.*, EPA, *Label Review Manual*, *available at* http://www.epa.gov/oppfead1/labeling/lrmail. No state agency, much less a court or jury, has resources or expertise which approach EPA's capability to scrutinize or regulate pesticide labeling.

Second, distribution of a FIFRA-registered product with its own, EPA-approved, nationally uniform labeling is essential for applying or using it in a safe and effective manner. As part of their product stewardship and marketing activities, manufacturers of agricultural, structural pest control, public health, and other types of pesticides provide written information to farmers, professional applicators, and other users regarding how to apply or use particular products safely and effectively in accordance with their EPA-approved labeling. Manufacturers, often in conjunction with distributors, university and extension personnel, state regulators, and national, state and local trade associations, also conduct educational and training sessions on a local, regional, or national level. *Label review and comprehension is the cornerstone of such programs.* Without nationally uniform labeling for a pesticide product, detailed application information and appro-

priate training would be difficult if not impossible to provide. Further, if pesticide manufacturers were confronted with the economic burden and logistical nightmare of distributing the same product for the same uses with different labeling required by different states (or inexpert juries), they could be forced to make their products available only in the states with the largest potential markets. That would deprive farmers in other states of the beneficial, cost-effective products that they need.

Third, across-the-board national labeling uniformity for all FIFRA-registered products with respect to format (*e.g.*, the listing of active ingredients), and the utilization of toxicity signal words (*e.g.*, "DANGER;" "WARNING") and precautionary statements for physical and chemical hazards (*e.g.*, "Corrosive, causes eye or skin damage;" "Extremely flammable"), facilitates applicator training and label comprehension. *See* 40 C.F.R. Part 156. Uniformity also is critical for first aid and the operations of the National Pesticide Information Center (http://www.npic.orst.edu) and other poison control centers. *See, e.g.*, Pesticide Registration ("PR") Notice 2001-1 ("First Aid Statements on Pesticide Product Labels") (EPA PR notices can be accessed through http://www.epa.gov/PR_Notices).

Fourth, to the extent feasible and appropriate, EPA also strives to achieve labeling uniformity for various categories of products in order to promote their safe and effective use. For example, in April 2004 EPA issued for comment draft uniform labeling statements for professionally applied, wide-area adult mosquito control products. *See* 69 Fed. Reg. 23,200 (Apr. 28, 2004). These labeling requirements, which EPA developed with input from state regulators, set forth certain specific language to be included on the labeling of such products. EPA's "purpose [is] to improve consistency in the labeling of this group of products [to] better serve the needs of users, regulators and the public." Draft PR Notice

2004-XX at 3. Among other things, the draft PR notice includes uniform mosquito product label language "to ensure use or supervision by trained applicators" and "to protect bodies of water and aquatic life." *Id.* at 4, 6. Along the same lines, EPA has adopted uniform requirements for certain aspects of the labeling of other categories of pesticide products. These include flammable total release room foggers, (40 C.F.R. § 156.78(d)), non-antimicrobial residential/household use insecticides (PR Notice 2001-6), insect repellents (PR Notice 2001-3), soil applied termiticides (PR Notice 96-7), and pet care pesticide products (PR Notice 96-6). The purpose of these and similar EPA labeling requirements for categories of products is to "bring uniformity" to pesticide labeling. *See* PR Notice 97-8.

Fifth, there are numerous national and regional structural termite and pest control companies and lawn care companies which apply pesticides in multiple states. Such firms develop and conduct their own extensive technician (*i.e.*, pesticide applicator) training, often with the assistance of product manufacturers and distributors. The same is true for the companies that protect public health through wide-scale mosquito and vector control. Applicator training would be exceedingly difficult to develop and conduct if a particular pesticide product used by a pest control company had different labels (with different warnings, personal protective equipment requirements, directions for use, etc.) in different states. To say the least, such disparate labels would be confusing and difficult to follow for individual pest control technicians, many of whom routinely cross state lines in a day's work.

Sixth, nationally uniform product labeling not only promotes applicator compliance, but also, state enforcement activities. Although § 136v(b) reserves to EPA alone the authority to regulate the content and format of pesticide labeling, Congress has assigned to the states the "primary

enforcement responsibility for pesticide use violations." 7 U.S.C. § 136w-1(a). This means that the states have the principal responsibility for ensuring that pesticides are applied or used in accordance with their nationally uniform labeling. Because of national labeling uniformity, state pesticide enforcement officia are able to interact with each other to address compliance issues relating to particular labeling requirements for specific products or categories of products. For example, the Association of Structural Pest Control Regulatory Officials ("ASPCRO") is a professional association whose members often comment to EPA as a group regarding labeling issues relating to specific termite control and other structural pesticide products. *See* http://www.aspcro.org. Another organization, the Association of American Pesticide Control Officials ("AAPCO") is comprised of state and federal pesticide regulatory officials. AAPCO's primary mission is "to encourage uniformity among the states in their pesticide regulatory programs," such as "uniform and effective . . . enforcement," including with regard to "safe use of pesticides." *See* AAPCO Mission Statement, *available at* http://aapco.ceris.purdue.edu/htm/mission.htm. AAPCO could not fulfill its mission without nationally uniform pesticide labeling.

The foregoing are only some of the reasons why Congress, in enacting § 136v(b), mandated nationally uniform pesticide labeling, which more than ever remains a *crucial* mechanism for achieving FIFRA's goals, especially protection of health and the environment.

B. Labeling-Related Damages Claims Would Impair—Not Promote—FIFRA's Goals

"The objectives and purposes of FIFRA include . . . comprehensive and uniform regulation of . . . labeling." *Worm*, 5 F.3d at 747. According to Petitioners, however, preemption of state damages actions that attack the adequacy of the warnings and other information on EPA-approved, nationally

uniform product labeling somehow conflicts with FIFRA's goals. *See, e.g.*, Pet. Br. at 14 ("To construe § 136v(b) as preempting the farmers' suits would be contrary to Congress's central aim. . . ."). One of the *amicus* briefs filed in support of Petitioners even argues that "FIFRA and state damages actions complement one another in a constructive way." Br. of Natural Resources Defense Council, et al. at 1. But *exactly the opposite* is true. Labeling-related damages claims would seriously undermine EPA's exclusive authority to regulate pesticide labeling, severely thwart national labeling uniformity, and substantially diminish the health, safety, environmental, and product performance benefits that only nationally uniform labeling can provide. Petitioners' argument (Pet. Br. at 25-26) that FIFRA did not preempt failure-to-warn suits *prior* to the pesticide regulatory sea change which Congress effected in 1972—in other words, before Congress' mandate for national labeling uniformity—proves nothing regarding the preemptive purpose, nature, and effect of § 136v(b), or the deleterious effects that labeling-related damages claims would have on the federal pesticide regulatory scheme today.

"[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation omitted). Congress' purpose in enacting § 136v(b), which is entitled "Uniformity," is absolutely clear: "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is *intended to completely preempt* State authority in regard to labeling. . . ." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added). It is simply *implausible* that Congress, utilizing the broad and unambiguous language of § 136v(b), would have so clearly intended to preempt the states from imposing their own additional or different requirements for labeling, but simultaneously intended to

allow the states, "through the back door by means of tort suits," to impose precisely such additional or different labeling requirements. *Etcheverry*, 993 P.2d at 376.

There can be no doubt that "[t]he effects of . . . the state tort suit are identical" to those of a "state agency regulation." *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment); *see also Cipollone*, 505 U.S. at 521 ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.") (internal quotation omitted); *Taylor*, 54 F.3d at 560 ("Awarding damages on the Appellants' claim would therefore be tantamount to allowing the state . . . to regulate pesticide labeling indirectly, an action which is specifically prohibited by § 136v(b)."); *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir. 1992) ("surely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the pesticide label"); *see generally* Viet D. Dinh, "Reassessing the Law of Preemption," 88 Geo. L.J. 2085, 2114 (2000) ("the effect of tort liability on primary conduct is the same as a statutory prescription or regulatory standard").

As a result, without preemption of labeling-related damages claims, nationally uniform labeling would become a mockery, or at the very least exceedingly difficult to achieve or maintain. The "undeniable practical effect" of such damages claims "would be that state law *requires* additional labeling standards not mandated by FIFRA; it cannot be presumed that businesses wish to bring about their own economic suicide." *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994). To avoid state tort liability for inadequate labeling, pesticide manufacturers would be compelled by the vagaries of each adverse jury verdict to seek EPA's permission to add more and more additional,

different, inconsistent and/or conflicting warnings, precautionary measures, directions for use, etc. to their "nationally uniform" labeling. "Such a change, if permitted by the EPA, would destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling . . . case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme." *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025-26 (11th Cir. 1991).

Furthermore, unlike EPA, common-law juries lack the expertise, experience, resources, and national perspective to review a pesticide's labeling for accuracy and adequacy, much less impose their own additional or different labeling requirements. Nevertheless, Petitioners' proposal to allow individual juries around the nation "to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's [labeling] determination[s]" would, as a practical matter, destroy national labeling uniformity. *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 73 (8th Cir. 1995). More specifically, the resultant jumble of differing or conflicting, jury-imposed warnings, precautionary measures, directions for use, etc. would compel manufacturers to try to devise "patchwork" labeling, which if approved by EPA, would be lengthy, confusing, contradictory, and challenging or impossible to follow. That in turn, would interfere with safe and effective use of pesticides.

Therefore, rather than promoting FIFRA's objectives, including the important goal of national labeling uniformity, damages claims for failure to warn or inadequate labeling would make them exceedingly difficult to accomplish, if not unattainable. As a result, FIFRA's "policy [of uniformity] by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different deci-

sions on similar facts." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 871 (2000). Rather than "complementing" EPA's regulation of pesticides and their labeling, such suits "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." *Id.* at 872.

III. CONGRESS DID NOT INTEND TO EXCLUDE FROM FIFRA PREEMPTION LABELING-RELATED DAMAGES CLAIMS THAT INVOLVE AGRICULTURAL CROP INJURY

Petitioners contend that even if § 136v(b) reaches damages claims, it does not apply to labeling-related claims which directly or indirectly allege that an agricultural pesticide's labeling was inadequate to prevent crop injury. *See* Pet. Br. at 29. Nothing in the plain, broad, preemptive language of § 136v(b), however, excludes state-imposed labeling requirements that involve agricultural crop injury or product efficacy. "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and what that provision provides a 'reliable indicium of congressional intent with respect to state authority,' *Malone v. White Motor Corp.*, 435 U.S., at 505, 'there is no need to infer congressional intent to pre-empt state laws from the *substantive provisions*' of the legislation." *Cipollone*, 505 U.S. at 517 (emphasis added). Nevertheless, Petitioners erroneously infer from one of FIFRA's substantive provisions, the efficacy data waiver authorization contained in § 136a(c)(5) of the statute's pesticide registration section, that Congress intended to create a gaping exception to preemption under § 136v(b) for labeling-related damages claims that involve efficacy-related agricultural crop injury. To the contrary, there is no basis for assuming that by enacting the 1978 efficacy data waiver

authorization as one of many federal registration refinements requested by EPA, Congress intended to upset the fundamental allocation of regulatory authority between EPA and the states, and specifically EPA's exclusive authority to regulate nationally uniform pesticide labeling, which was so carefully considered only six years earlier when Congress rewrote FIFRA and enacted § 136v(b). If Petitioners' unfounded view of the (nonexistent) relationship between the efficacy data waiver authorization and § 136v(b) were correct, it would follow *a fortiori* that for more than 25 years the states have been free to enact statutes or issue agency rules that regulate pesticide labeling to prevent efficacy-related crop injury. Not surprisingly, despite the supposed "regulatory gap" created by EPA's efficacy data waiver policy (Br. for Natural Resources Defense Council at 23), neither Petitioners nor their *amici* have pointed to any such state positive enactments.

There is no indication in the legislative history of the Federal Pesticide Act of 1978 that Congress intended the efficacy data waiver authorization of § 136c(5)(a) to amend or otherwise affect § 136v(b) in any manner. Instead, the efficacy data waiver authorization was one of a number of pesticide registration-related amendments which EPA requested during 1977-78 because under the 1972 Act, the federal "registration and reregistration process has ground to a virtual halt." S. Rep. No. 95-334, at 3 (July 6, 1977); *see* H.R. Rep. No. 95-343, at 6 (May 16, 1977) (Stmnt. of Douglas M. Costle, Admin., EPA) (discussing "specifics about correcting the difficulties which currently beset the pesticides regulatory program"). "The [1978] amendments [were] designed to improve the operation of the Federal pesticide registration program and facilitate the implementation of the major changes in that program made by the 1972 amendments to the Act." S. Rep. No. 95-334, at 1; *see also* Stmnt. of Sen. Leahy on Consideration of the Conf. Rpt.

on S. 1678, September 18, 1978, at 1-2, Sen. Comm. on Agric., Nutrition & Forestry, 95th Cong. (Comm. Print 1979) ("This bill will break the logjam in the reregistration process"). The 1978 amendments to FIFRA's registration and reregistration provisions included changes to the data consideration, data compensation, and trade secrets provisions with regard to the granting of "generic" (*i.e.*, me-too) pesticide registrations (*see Ruckelshaus*, 467 U.S. at 993-94); expedited registration procedures for "formulator" products containing registered active ingredients purchased from another company; provisions for the granting of "conditional" registrations prior to submission of all data required for registration or reregistration; provisions relating to registration of pesticides for "minor" agricultural uses; extension of the period for reregistering previously registered pesticides; and the efficacy data waiver authorization. *See* S. Rep. No. 95-1188 (Sept. 12, 1978). Upon signing the Federal Pesticide Act of 1978, President Carter stated that "[w]ith these amendments, the important task of registering pesticides may move forward in a more streamlined and efficient manner." 14 Weekly Comp. Pres. Doc. 1696 (Oct. 2, 1978).

As to the specific need for the efficacy data waiver authorization, EPA Administrator Costle testified in April 1977 "we feel that far too much Agency time is currently being spent in reviewing efficacy data *while shortages abound in the reregistration data validation areas*." H.R. Rep. No. 95-343, at 9 (May 16, 1977) (emphasis added); *see also* 44 Fed. Reg. 27,932, 27,938 (May 11, 1979) ("The decision to pursue efficacy waiver as an Agency policy stemmed from a need to reduce the amount of resources devoted to reviewing product performance *so that additional effort could be devoted to the evaluation of health and safety data, and from a desire to reduce regulatory burdens in pesticide registration.*") (emphasis added). Therefore, "the purpose of Congress" (*Cipollone*, 505 U.S. at 516) in enacting the efficacy data

waiver authorization had nothing whatsoever to do with preemption of state law. Instead, "Congress intended to give EPA broad discretion to determine how best to expend its limited resources reviewing pesticides." 48 Fed. Reg. 34,000, 34,001 (July 26, 1983); *see also* S. Rep. No. 95-334, at 3 ("The expenditure of resources by the [EPA] in reviewing efficacy data is not the best use of resources since a pesticide manufacturer is not likely to expend the substantial investment in time and money needed to obtain registration of a pesticide on a non-efficacious product."). Petitioners' theory that § 136v(b) only applies when manufacturers submit to EPA for review, data on a particular subject (*e.g.*, efficacy) *defeats the very purpose of the waiver*, which is to afford EPA flexibility to efficiently allocate its limited scientific resources by requiring submission of efficacy data only when and if crop damage problems develop after a product is registered and in use.

Moreover, the labeling-related crop injury claims which Petitioners incorrectly assert the efficacy data waiver authorization excludes from preemption, would conflict with how Congress intended review of product efficacy to work. The provision's legislative history explains that if "the Administrator found that *some other procedure for assuring the efficacy of pesticide products appeared to be sufficient* [he] could register or reregister products without requiring submission or citation of *some or all* of the efficacy data that otherwise would be required under FIFRA." H.R. Rep. No. 95-663, at 27 (1977) (emphasis added).

> This authority would be used most commonly with respect to agricultural pesticides, due to the *high level of knowledge concerning pesticidal efficacy which prevails in the agricultural community*, the existence of means for communicating efficacy information to users, the *organizational expertise of the Department of Agricul-*

> *ture, the Extension Services, and the universities* in this area, and the *stake the industry has in marketing products that are efficacious.*

Id. (emphasis added). Along the same lines, when EPA adopted its efficacy data waiver policy pursuant to § 3a(c)(5), the Agency indicated that "the efficacy of agricultural pesticides can be effectively regulated by the marketplace (*in conjunction with extension services and university research personnel*). 44 Fed. Reg. at 27,938 (emphasis added). Thus, both Congress and EPA indicated that waiving submission of efficacy data was possible because of the considerable, efficacy-related *knowledge* and *expertise* present within the agricultural community. Regulation of labeling by lay jurors, who lack the high level of knowledge and expertise contemplated by Congress, would be incompatible with, and seriously undermine, the type of expert "marketplace regulation"—not courtroom regulation—that Congress and EPA envisioned.

Unless preempted, labeling-related claims involving agricultural crop injury would wreak the same havoc with national labeling uniformity as labeling-related damages claims involving any other subject. Petitioners' premise that there are no pertinent labeling "requirements" because EPA has abandoned regulation of labeling in connection with product efficacy and crop injury prevention is belied by the actual language of the Agency's efficacy data waiver. *See* 40 C.F.R. § 158.640(b)(1) ("The Agency has waived all requirements to submit efficacy data. . . . *However*, each registrant *must ensure through testing* that his products are efficacious when used *in accordance with label directions* and commonly accepted pest control practices. The Agency *reserves the right to require*, on a case-by-case basis, *submission of efficacy data* for any pesticide product") (emphasis added). Thus, for most products (but not including the Strongarm product at issue here) EPA merely has waived the automatic

submission of efficacy data at the time a product is first registered. When EPA adopted this policy, it explained that "[t]he Administrator reserves the right to request submission of efficacy data in support of label claims *for any registered product*. A request may be made *for any product for which a pattern of inadequate performance* has been reported." 44 Fed. Reg. at 27,939 (emphasis added). Accordingly, when and if efficacy-related problems develop after a pesticide product has been registered and used by farmers, EPA has the authority, both under FIFRA and its own efficacy data waiver regulation, to require submission of efficacy data and regulate the product's nationally uniform labeling to prevent crop injury. Nothing about the efficacy data waiver authorization or the selective manner in which EPA has implemented it changes the fact that any requirements for labeling imposed through state damages claims for crop injury necessarily would be "in addition to or different from" the requirements for labeling imposed by EPA under FIFRA, and therefore, expressly preempted by § 136v(b).

The Texas Supreme Court in *American Cyanamid v. Geye*, which involved the same FIFRA preemption issue, got it wrong. The court acknowledged that "[t]his is an express preemption case," but instead of focusing on the language of § 136v(b), erroneously indicated that "*EPA regulations* define 'the domain expressly pre-empted.'" 79 S.W.3d at 24 (quoting *Cipollone*, 505 U.S. at 517) (emphasis added). The court then mistakenly assumed that EPA's efficacy data policy means that the Agency never regulates labeling to prevent crop injury. *Id.* at 25. The federal courts of appeals have reached the opposite and correct conclusion. *See, e.g., Kuiper*; *Welchert*; *Taylor*; *Worm*. As the Fifth Circuit explained in its opinion below,

> We find *Geye* unhelpful because *it did not address the principal issue: whether the scope of FIFRA's express preemption clause includes product effectiveness claims*

> *which relate to product labeling. Geye* holds only that the specific Texas state-law claims for crop damage did not present a problem of conflict preemption. . . . The scope of FIFRA's express preemption clause is defined by the simple text of § 136v. That the EPA has not elected to impose labeling regulations concerning product effectiveness *does not alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling requirements.*

Pet. App. 14a-15a (emphasis added).

CONCLUSION

The Fifth Circuit's opinion should be affirmed.

Respectfully submitted,

DOUGLAS T. NELSON
SEEMA MAHINI
CROPLIFE AMERICA
1156 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 296-1585

LAWRENCE S. EBNER *
MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 2 0006
(202) 496-7500

Attorneys for Amici Curiae

* Counsel of Record

November 2004